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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-281

CAROL BLACK, PAULA BLACK AND MRS. JO SWIFT, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

v.

FIRST NATIONAL BANK OF FORT WORTH, TEXAS, ADMINISTRATOR OF THE ESTATE OF ALLAN T. BLACK, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fifth Circuit

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on April 22, 1971, and the Petition for Rehearing, and for Rehearing en Banc, overruled and denied, May 27, 1971.

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Texas, Dallas Division, is reported at 303 Fed. Supp. 1249, and appears as Appendix A herein. The opinion of the United States Court of Appeals for the Fifth Circuit is reported as 441 Fed. 2d 741, and appears as Appendix B herein; and the Order overruling the Petition for Rehearing and for Rehearing en Banc appears as Appendix C herein.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit (Appendix B) was entered April 22, 1971, and the Petition for Rehearing and for Rehearing en Banc was overruled and denied by Order (Appendix C) entered May 27, 1971.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. In a multi-state Federal Tort Claims case involving the deaths of aircraft passengers, wherein the Government's admitted negligent omission occurred in Louisiana and the crash occurred in Texas, *whether* the Court of Appeals was required to apply the law of Louisiana, (i) that presumes the dead pilot was not negligent, and (ii) conclusively presumes that the dead pilot acted so as not unnecessarily to have exposed himself to harm (as distinguished from the Courts' substituted contrary holding on presumption, and without proof, that the dead pilot was negligent, and that such negligence was the sole proximate

cause, superseding the Government's negligence as a direct, substantial and proximate cause of the aircraft crash.

2. In a Federal Tort Claims case involving the deaths of aircraft passengers wherein under the Government's admissions and on proof, the District Court found (i) that the Government's Flight Service Station Operator was negligent (violating F.A.A. established procedures) while in radio contact with the pilot, in failing to inquire as to the pilot's route and destination and advise him of the severe weather which he would encounter on his course; and, (ii) that the primary cause of the crash was a thunderstorm on his route, and (iii) that the Government's negligence was a proximate cause, a material element and a substantial factor in producing the crash, *whether* the Court of Appeals (on presumption and without proof) can substitute therefor, its own contrary conjectural findings that the dead pilot probably could have seen and appreciated the dangers of, and extricated himself from, the hazardous condition into which the Government's negligence had projected him; and conjecture further that the pilot was negligent in presumably failing to see, appreciate and extricate himself from the hazard into which the Government's negligence had projected him; and conjecture further on presumption that such pilot negligence was the sole proximate cause of the crash, superseding the Government's negligence as a cause, so as to exonerate the Government from liability to Petitioners.

3. Whether the Court of Appeals' conduct in substituting its findings (without evidentiary support) for

those of the District Court (which are supported by both Governmental admissions and proof) on pilot and Governmental negligence and causation is judicial error constituting a violation of Rule 52(a), F.R.C.P. and/or an unconstitutional judicial deprivation of Petitioners' property without the due process of law afforded by Rule 52(a), F.R.C.P.

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

1. *Federal Tort Claims Act*, 28 U.S.C. Section 1346 (b) (Appendix D).
2. *Federal Rules of Civil Procedure*, Rule 52 (a) (Appendix E).
3. *Due Process Clause, Fifth Amendment, Constitution of the United States* (Appendix F).
4. *The Federal Aviation Agency Flight Assistance Service Handbook*, Part 439, Section 439.2 (Appendix G).

STATEMENT

This is a multi-state Federal Tort Claims case involving the deaths of two aircraft passengers, Dr. & Mrs. Tom Black, in an aircraft crash near Mabank, Texas on May 9, 1965. Suit is brought against the United States by Petitioners, Carol Black and Paula Black, daughters of Dr. & Mrs. Black, and by Mrs. Jo Swift the mother of Mrs. Black. The United States filed a Third Party Complaint against the Estate of one Allan Black (pilot) which Estate cross-claimed against the United States. It was agreed between the parties, in keeping with the law, that the substantive law of Louisiana applied.

Liability against the United States was predicated on facts both admitted and proved; that the pilot during flight from Baton Rouge, Louisiana, to Fort Worth, Texas, was in radio contact with the United States Flight Service Station Operator at Alexandria, Louisiana; that at such time, the Government Operator had significant weather information concerning hazardous thunderstorms within 135 nautical miles of his station in an area that was in the pilot's flight path; that F.A.A. procedures then required such Government Operator, under these conditions, in radio contact with a pilot, to inquire of the pilot, his course and destination and give the pilot such weather information; that the Flight Service Station Operator did not make such inquiry of this pilot, and did not give him such weather information; that such failure by the Flight Service Station Operator was negligence; that such failure by the Flight Service Station Operator may foreseeably, and did here, mislead the pilot into the belief that his flight path was safe, and thus project the aircraft into the dangerous severe weather conditions that resulted in the crash of the aircraft and the deaths of the passengers; that the Government's negligence was a material and a substantial factor in, and a proximate cause of, the crash of the aircraft, the deaths of the passengers and the damages sustained by the Petitioners.

Trial was to the United States District Court for the Northern District of Texas, Dallas Division, Honorable W. M. Taylor, Jr. Upon admissions of fact and proof of record, the District Court found (Memorandum Opinion, Appendix A) that the Flight Service Station Operator or Specialist at the Alexandria Station, although required to do so by *Section 439.2 Federal Aviation Agency Flight Assistance Service Handbook*, did not inquire of pilot

Black, his destination or his course, nor did the Specialist advise the pilot of the significant weather within 150 miles of Alexandria, although at such time he had severe weather forecasts and information calling for thunderstorms within the area covered by this pilot's flight path; that the primary cause of the crash of the aircraft was a thunderstorm in progress at the time and place in question; that the failure of the Flight Service Station Operator or Specialist to comply with such procedure was negligence which was a proximate cause of the crash and resulting damages; that the very purpose of the said procedures was safety, and because of the existence of such procedures and regulations, pilots in radio contact with a Flight Service Station would be expected and entitled to rely on the fact that significant weather information would be conveyed to them by the Flight Service Station and assume from the station silence that none existed; that the failure to warn the pilot of the severe thunderstorms which would be encountered on a flight from Alexandria to Fort Worth was that which in a natural and continuous sequence, unbroken by any intervening cause, produced the crash, and was a cause without which the crash would not have happened; that the crash was an event which might reasonably be anticipated or foreseen as a natural consequence of the Government's wrong; and the failure of the Flight Service Station Operator was a material element and a substantial factor in producing the crash; and that the Petitioners were damaged in a total sum of $250,000 by reason of the negligence of the United States. Judgment was entered by the Court in favor of Petitioners, and against the United States, for such damages.

On April 22nd, 1971, the Court of Appeals reversed the District Court and rendered judgment for the United

States that Petitioners take nothing. On May 27, 1971, the Court of Appeals denied Petitioners' Petition for Rehearing, and for Rehearing en Banc.

In its decision, the Court of Appeals substituted itself for the District Court as fact finder, in violation of Rule 52 (a) F.R.C.P.; made its own findings of fact totally unsupported by any evidence of record in the case, which findings are based solely upon its own presumptions, conjecture, surmise, and a pyramiding thereof, concerning what the dead pilot could or could not see and do; and so presumed that the dead pilot acted so as to expose himself to harm, and presumed therefrom that the dead pilot was negligent, which negligence was, on further presumption, not only found to be a proximate cause, but the sole proximate cause of the crash, superseding the negligence of the Government that sent the aircraft into the hazardous condition in which it crashed.

The Court of Appeals made these substituted findings, not only totally without supporting evidence, but in direct disregard of the substantive law of Louisiana that the Courts were required to follow under both the *Federal Tort Claims Act,* 28 U.S.C. Section 1346 (b) (Appendix D) and *Richards v. United States,* 82 S.Ct. 585, 369 U.S. 1.

In this regard, the substantive law of Louisiana is:

> "The law presumes the instinct of self-preservation in the deceased, caused him to look and listen and to exercise due care under the circumstances."

(*Kern v. Knight, et al,* 127 So.2d 133); and,

> "* * * A person is conclusively presumed to act in such a manner as will not unnecessarily expose himself to physical harm."

(*Lipscomb v. News Star World Publishing Corp.*, 5 So.2d 41, 45) and instead of following it, the Court of Appeals (Opinion, Appendix B) disregarded the Louisiana substantive law and without evidence presumed that the dead pilot, having been projected into an extremely dangerous condition by the Government's negligence, could nevertheless see and appreciate the hazards, and the dangerous condition, and could extricate himself therefrom, so as to avoid the crash, and then pyramiding the presumptions, go on to presume that his failure to avoid the crash is indicative of, and was, negligence on his part, presumably further, not only a proximate cause, but the sole proximate cause of the crash, superseding the Government's negligence that sent him into the dangerous condition that produced the crash.

This holding moreover violated the Louisiana substantive law that: the proximate cause of an event "is not necessarily that which is next or last in time or place" but is "the one that necessarily puts the other causes in operation" so that "the party who puts in force the first efficient cause (here the Government) will be responsible." *Harvey v. Great American Indemnity Co.*, 110 So.2d 595; *Home Gas & Fuel Co. Inc. et al v. Mississippi Tank Co., Inc., et al,* 246 La. 625, 166 So.2d 252.

Moreover, the Court of Appeals based its findings solely on a presumption as to what the pilot did or could do or see or know, pyramiding these presumptions one upon another to build for itself a concept of negligence, proximate cause and sole and superseding cause so as to defeat Petitioners' cause of Action. There is no word of record evidence as to what the dead pilot did or did not see, or could or could not do, if anything, to avoid or

extricate himself from the predicament into which the Government's negligence had placed him.

It is basic that Courts cannot find facts unproved, and cannot treat facts inferred or presumed as being established, so as to serve as basis for further inference or presumption to pyramid or spin out a chain of inference and presumption in sheer speculation or conjecture. *Travelers Insurance Company v. Warrick,* 172 Fed.2d 516, and *Smith v. Fidelity & Casualty Co. of New York,* 261 Fed.2d 460.

It is also basic that the Court of Appeals must follow its own rules, including Rule 52 (a) F.R.C.P. (Appendix E). This rule is law, and is due process of law, and prohibits the Court of Appeals from sitting as a fact finder to substitute its findings of fact for those of the District Court. Excepted only is the isolated instance wherein the Court of Appeals may set aside (not substitute) findings (as "clearly erroneous") only when the findings of the District Court are not based on substantial credible evidence, or are not based on a proper view of the applicable law. *Blum v. Great Lakes Carbon Corp.,* 418 Fed.2d 283, *Travelers Insurance Co. v. Truitt,* 280 Fed.2d 784 and *Pan American Petroleum Corp. v. Orr,* 319 Fed.2d 612. Refusal of the Court of Civil Appeals to follow Rule 52 (a) denies Petitioners their cause of action without the due process of law afforded to them by Rule 52 (a) and is a judicial denial of due process of law, contrary to the Fifth Amendment of the Constitution of the United States.

The Court of Appeals' decision in this case moreover is in direct conflict with the Court of Appeals' decision in *Hartz v. United States,* 387 Fed.2d 870. In *Hartz,* this

Court held; "Before a pilot can be held legally responsible for the movement of his aircraft, he must know, or be held to have known, those facts which were material to the safe operation of his aircraft," that it was the Government controllers' "duty to direct and guide" the plane in a manner consistent with safety; that "it was the controllers' responsibility to appropriately warn" the pilot "of the possible danger"; that "when Government undertakes to perform services . . . it will . . . be liable if these activities are performed negligently."; that "the controller knew he was clearing" the plane "into possible danger"; and that "the controller . . . may have misled" the pilot "to believe he would . . . not endanger his aircraft." The *Hartz* rules apply precisely to the case at bar.

The dead pilot in the case at bar, (in law presumed free of negligence) could not be legally responsible for the movement of his aircraft unless he actually knew, or was properly held to have known, the weather information material to safe operation of his aircraft. It was the Government Operators' duty to furnish him with the significant weather information necessary to the safety of his aircraft and passengers. The Government Operator negligently failed to furnish this information in the case at bar, although it had superior knowledge of the severe weather ahead, and knew that its silence when it had a duty to speak, was clearing this plane to fly unwarned into possible danger from the numerous thunderstorms along the plane's proposed route; and by the Government Operators's silence, when he should have spoken, he misled the pilot into believing that no possible danger from the weather existed in his path, and thus projected these people into the weather that destroyed them.

Failure of the Operator to warn the pilot in this case, was no different, no less misleading, and no less a proximate cause, (as the District Court correctly found) of the crash, than was the failure of the controller to warn the pilot in the *Hartz* case.

The Court of Appeals in *Hartz* declined, and properly so, to presume and thence conclude that the Government's negligent failure to warn the pilot was superseded by an indulged speculative presumption that the dead pilot probably (a) knew the condition of which the Government should have warned him; and (b) if so, presumably appreciated the danger arising from that condition of which the Government should have warned him; and (c) if he did, pyramiding further, presuming that he had such knowledge and appreciation within time to have extricated his aircraft from the dangerous condition in which the Government's negligence had sent him, to ultimately conclude that these presumptions absolved the government from its legal responsibility, under the theory that Governmental negligence as a cause was superseded by presumed negligence which was presumably a cause and a sole cause. The decision in the case at bar and in *Hartz* are in conflict, and irreconcilably so.

The Court of Appeals decision in this case is in direct conflict with the Court of Appeals' decision in *Gill and Barlow v. United States,* 429 Fed.2d 1072. The *Gill* case involved the deaths of aircraft passengers resulting from the Government's Waco Flight Controllers negligently furnishing the pilot with weather information which was "inexact, incomplete and in all reasonable probability, misleading"; such negligence projected the pilot into dangerous weather conditions in which he crashed; and the Court

held, concerning a contention that the pilot may previously have known of the bad weather when at Longview, that "assuming that the pilot did receive the information, the possession of it would not excuse a subsequent breach of duty by the Waco Controller possessed of greater experience, superior observation facilities, and localized information, as the pilot approached closer to the area of possible bad weather and requested localized and more current information". (precisely the effect of this dead pilot's contact with the Alexandria Flight Service Station, whose report was equally "inexact, incomplete and in all probability misleading").

In *Gill,* the Court said "the District Court's finding of proximate causation is not plainly erroneous". In the case at bar this Court said, on indistinguishable facts, that "in our judgment, the findings of the Lower Court on the issue of proximate cause are clearly erroenous".

On causation, in *Gill,* this Court held:

> ", . . the fact that in the urgencies of the situation, the pilot did not seek a safe haven in the one manner earlier suggested by the Waco controller as a possibility, *did not interrupt the causal relationship.*" (Emphasis ours)

In the case at bar, indulging exclusively presumption and speculation as to the knowledge, appreciation and capability of the pilot to avoid the dangerous weather into which he had been sent by the negligence of the Government, the Court said:

> "The failure of the operator to warn the pilot of the presence of the storm in his path *cannot be regarded as a continuing proximate cause* after the pilot him-

> self discovered its presence, appreciated the danger, and decided to fly into it.
>
> * * *
>
> "Appellant's negligence had 'so far spent itself as to be too small for the law's notice' and was so completely superseded by that of the pilot that it was no longer an immaterial element contributing to the tragic result that ensued." (Emphasis ours)

The decision in the *Gill* case and the case at Bar are in irreconcilable disharmony and preclude a uniformity of decision between these two cases arising in the United States Court of Appeals.

The Court of Appeals' decision in this case is in direct conflict with the Court of Appeals' decision in *Ingham v. Eastern Airlines Inc.*, 373 Fed.2d 227. In the *Ingham* case the Government's Airport Traffic Controller failed to notify a landing aircraft that weather conditions were such that visibility had dropped by 25%, and as a result, the aircraft crashed. The Government argued that even assuming its negligent breach of duty to report weather conditions, that the failure was not the proximate cause but rather was the result of the plane crew's failure to execute a missed approach. The Court there held that "the pilot should have been told that weather conditions were becoming marginal, and that he might well encounter less than minimum visibility upon reaching the runway. This information would have signalled to the pilot that a missed approach might have to be executed. * * * In the light of these circumstances, we agree that the negligent failure of the Government to inform EAL 512 that visibility had dropped to three-quarters of a mile . . . was a proximate and concurrent cause of the accident".

In the case at bar, the conclusion of this Court of Appeals that the failure of the Government Operator to warn the pilot of the storm in its path cannot be regarded as a continuing proximate cause after the pilot (presumptively) discovered its presence (presumptively) appreciated the danger, and (presumptively) decided to fly into it, is in direct conflict with the holding, and violates the role and spirit of *Ingham v. Eastern Airlines, Inc.*, supra.

The Court of Appeals' decision rendered in this case is in direct conflict with the Court of Appeals' decision in *Stork v. United States*, 430 Fed.2d 1104. In that case, the Tower Controller failed to warn the pilot, when clearing him for take-off, that weather conditions created zero visibility. In response to the Government's claim that such breach of duty was not a proximate cause of the crash, the Court held "it is clear from the record that the take-off was in reliance upon the unqualified grant of clearance by the tower, and that even the most cursory statement of caution might have caused the pilot to abandon the fatal take-off. It was sufficient in *Ingham v. Eastern Airlines, Inc.*, supra, that the availability of further weather information might have caused the pilot there to decide to abandon his attempt in landing."

The decision in the *Stork* case and in the case at bar are in irreconcilable disharmony and, as with the others, precludes uniformity of decision in the Courts.

In the same vein, the decision at bar is further in direct conflict with *United States v. Furumizo*, 381 Fed.2d 965.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals should be reviewed because proper application of the requirements

of the *Federal Tort Claims Act* and *Richards v. United States,* 82 S.Ct. 585, 369 U.S. 1, required the Court of Appeals to apply the substantive law of Louisiana to legally presume the dead pilot not negligent, and to conclusively presume that he acted so as not unnecessarily to have exposed himself to harm, and the Court of Appeals in this instance violated these requirements of law, disregarded the Louisiana substantive law, and held directly to the contrary thereof, so as to hold, on a pyramiding of presumption and conjecture, wholly without evidence, that the dead pilot was negligent, and such negligence was not only presumably a proximate cause, but was presumably the sole proximate cause of the crash, superseding the admitted negligence of the Government. This is such a direct departure from the text, intent and Supreme Court construction of the *Federal Tort Claims Act* that it is a repudiation by the Court of Appeals of the requirements of this Court in *Richards v. United States,* supra, and is a rejection of the express terminology of the *Federal Tort Claims Act* itself. This Court of Appeals effectively holds, contrary to *Federal Tort Claims Act* and to *Richards* that a Federal Court at its election and selection, may in a Federal Tort Claims Case, apply only such of the substantive law of the place of negligence as it deems helpful to achieve its desired result, and it may disregard or reject such of substantive law of that place that would tend to defeat the desired result. Orderly administration of the law, sound practice by litigants and Courts, and the doctrine of Stare Decisis, all are necessary to the proper administration of justice. It is destructive of these principles and objectives to permit a Court of Appeals to avoid its responsibilities in this regard, whether done by direct repudiating statement denying the appli-

cability of the Louisiana law, or whether done by inference, indirection or evasion, ignoring, as though it were nonexistent, the cited Louisiana substantive law principles pertinent to the case, by declining to note or rule upon such matters. A litigant is entitled to have the Court follow applicable law, and is entitled to have matters concerning the context and applicability of the substantive law considered and adjudicated as respects their case. This is a fundamental concept of judicial due process. The practice by the Court of Appeals in this case should be reviewed.

2. Rule 52 (a), F.R.C.P. is the due process of law that prescribes the limits of the Court of Appeals' power to set aside (as distinguished from substitution of) fact findings made by the District Court. Action by an appellate court, as here, that deviates from the rule to effect a denial to Petitioners of their damages, and cause of action (a property right) constitutes a judicial deprivation of Petitioners' property without the due process afforded them by Rule 52 (a), and is thus prohibited by the Fifth Amendment to the United States Constitution. District Court findings cannot, as a matter of law, be set aside (as "clearly erroneous") if based on substantial credible evidence and based on a proper review of the applicable law (here the substantive law of Louisiana). *Blum v. Great Lakes Carbon Corp.*, 418 Fed.2d 283; *Travelers Insurance Co. v. Truitt*, 280 Fed.2d 784, and *Pan American Petroleum Corp. v. Orr*, 319 Fed.2d 612.

The District Court findings on governmental negligence and proximate cause are directly supported by both admissions by the Government, and substantial credible

evidence, and proper application of the Louisiana substantive law. The Court of Appeals' rulings are solely improper substitutions by the Court of Appeals of its own findings of fact on causation for those of the District Court, are based on no evidence whatsoever, and utterly disregard the applicable Louisiana substantive law on both negligence, and causation.

The Court of Appeals' substituted findings violate not only Rule 52 (a), in its basic context, but violate the most basic principles that prohibit all Courts from finding facts based upon no evidence, and that are based solely on a pyramiding of inference and presumption to produce a purely conjectural result. Obviously, if this practice is permitted and approved by this Court, any result could be achieved by surmise and guess.

Where, as here, everyone aboard the aircraft was killed, it is the rankest conjecture by the Court of Appeals to presume that the dead pilot could both see and appreciate the dangers of the weather conditions into which the Government's admitted negligence had sent him, then to presume therefrom that the dead pilot could have extricated himself from this situation to avoid disaster, then to presume therefrom that if he could have thus extricated himself, and did not do so, (since he crashed in the thunderstorm) that he therefore negligently chose to expose himself and his passengers to harm, and negligently failed to extricate himself from the dangers into which the Government had sent him, and finally, to peak the pyramid of presumption to presume then that his presumed negligence was the sole cause of the crash, superseding the admitted negligence of the Government that directly sent the plane to its end.

No concept of justice, and of due process of law, can accept such a deviation of rules of law by the Court of Appeals as providing a fair and impartial adjudication and trial of the matters in litigation on appeal. A review by this Court is essential to justice in this case.

3. Since the Government has undertaken to provide aviation weather service, it has a corresponding obligation to perform the service properly and without negligence, and if it fails thus, it is liable for the consequences of its negligence. *Ingham v. Eastern Airlines,* 373 Fed. 2d 227, Cert. den., *Hartz v. United States,* 387 Fed. 2d 870, *Gill & Barlow v. United States,* 429 Fed. 2d 1072, *Stork v. United States,* 430 Fed. 2d 1104 and *United States v. Furumizo,* 381 Fed. 2d 965. The essence of all of these decisions is, that governmental failure to furnish accurate weather data, or affirmatively to furnish inaccurate data, is a Governmental breach of duty. The Government knows that the pilots rely on the service furnished by the Government and knows that faulty information will mislead them, and that misleading the pilot as in *Ingham, Hartz, Gill, Stork* and *Furumizo,* will likely project the pilot and the aircraft into a dangerous situation that he cannot overcome. Hence the Government's liability for its negligence in these cases.

It is out of keeping with, and contrary to, the principles and purposes announced in these cases to allow a Court of Appeals, as here, to say that although Governmental negligence projected the pilot into a desperately dangerous situation, productive of foreseeable disaster, that nevertheless, the Government is exonerated from liability for its malpractice because the Court presumes the dead pilot

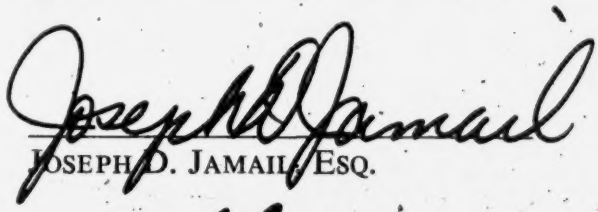
could and should have overcome the Government's negligence and extricated himself from the hazard into which the Government sent him. Such holding by this Court moreover violates the Louisiana substantive law of causation (quoted above) as exemplified in *Harvey v. Great American Indemnity Co.*, 110 So.2d 595; *Home Gas & Fuel Co. et al v. Mississippi Tank Co., Inc. et al*, 246 La. 625, 166 So.2d 252.

Review of the Court of Appeals' decision is imperative to prevent a conflict between the decision in this case and the prior decisions of appellate courts on these same matters, in order to compel a uniformity of decision on Federal questions involved in the case, to compel the required application of Louisiana substantive law, and to prevent the Court's unusual departure from the accepted and usual course of appellate judicial proceedings.

4. The questions presented by this case are of substantial and recurring importance in the administration of the *Federal Tort Claims Act* and in the administration of justice in the Federal appellate judicial system. If the appellate decision is not reversed, there would be permitted to stand, as legal precedent, a decision that is in direct conflict with this Court, with the *Federal Tort Claims Act*, and with that large body of *Federal Tort Claims* cases that arise out of aircraft disasters. Review by the Supreme Court is essential.

CONCLUSION

For the reasons set forth herein above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.



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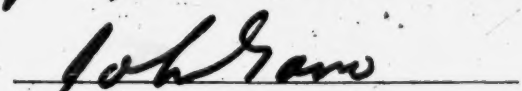

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PROOF OF SERVICE

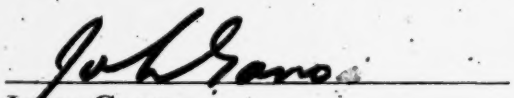
I, John Gano, one of the attorneys for Petitioners, Carol Black, Paula Black and Mrs. Jo Swift, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, that, on the 24th day of August, 1971, I served three copies of the foregoing Petition for Writ of Certiorari on each and all of the several parties required to be served, as follows:

(i) On the United States by mail by depositing three copies in the United States Post Office, Houston, Texas, in a duly addressed envelope with airmail postage prepaid, addressed to Counsel of Record for the United States, to-wit; to Messrs. William D. Ruckelhaus, Carl L. Eardley, Eldon D. Mahon, Walter H. Fleischer and Herbert L. Lyons, United States Department of Justice, Washington D.C., 20530.

(ii) On the United States by mail by depositing three copies in the United States Post Office at Houston, Texas, in a duly addressed envelope with airmail postage prepaid, addressed to Counsel of Record for the United States, to-wit; to Mr. Melvin M. Diggs, United States Attorney, and Kenneth J. Mighel, Assistant United States attorney, United States Court House, Dallas, Texas.

(iii) On the United States by mail by depositing three copies in the United States Post Office, Houston, Texas, in a duly addressed envelope with airmail postage prepaid, addressed to Counsel of Record for the United States, to wit; to The Solicitor General, Department of Justice, Washington, D.C. 20530.

(iv) On the First National Bank of Fort Worth, Texas, Administrator of the Estate of Allan T. Black, by mail by depositing three copies in the United States Post Office, Houston, Texas, in a duly addressed envelope with airmail postage prepaid, addressed to Counsel of Record for said party, to-wit; to Mr. John B. McClane, Attorney at Law, 18th Floor, Commerce Building, Fort Worth, Texas 76102.



JOHN GANO
Attorney for Petitioners
700 Houston First Savings Bldg.
Houston, Texas 77002

APPENDIX A

(District Court's Memorandum Opinion—
303 Fed. Suppl. 1249)

[Caption Omitted]

Filed Sep 17 1969

MEMORANDUM OPINION

This action was brought against the United States under the Federal Tort Claims Act for the wrongful death of Dr. Thomas Black and his wife, Jane Black, who were passengers on a Cessna 182 aircraft which crashed near Mabank, Texas, on May 9, 1965, at about 4:48 P.M. The aircraft, Registration No. N 4841D, was piloted by Allan Black, son of decedents. Allan Black held a commercial pilot's license, but did not have his instrument rating. This suit is brought by Carol and Paula Black, daughters of Dr. and Mrs. Black, and by Mrs. Jo Swift, mother of Mrs. Black.

The United States filed a third party complaint against the Estate of Allan Black, which estate in turn filed a cross-claim against the United States.

It appears from the evidence that the plane (sometimes referred to as 41 D) left on its ill-fated flight from Baton Rouge, Louisiana, at approximately 2:00 P.M. on Sunday, May 9, 1965, under Visual Flight Rules conditions (VFR). It was bound for Russell Field, Fort Worth, Texas, which was the home field of the aircraft, and Fort Worth was the home of decedents. Prior to leaving Baton Rouge, Allan Black had not filed a flight plan and the government proved that the Weather Bureau

Airport Station at Baton Rouge maintained "Daily Pilot Weather Briefing Log" and that such log failed to show that a pilot named Allan Thomas Black or a plane identified as Cessna 182A, N 4841D was given a weather briefing on May 9, 1965. At about 3:00 P.M. the aircraft was in the vicinity of Alexandria, Louisiana, and Pilot Black contacted the Flight Service Station maintained by the Federal Aviation Agency (now Federal Aviation Administration) and requested the current altimeter setting and the winds at five thousand feet. He was given this information by Specialist Truman Stanley who was on duty at the time at the Alexandria Flight Service Station. Specialist Stanley gave him no other information. (The tape recording of the conversation between the Flight Service Station and Allan Black was lost, destroyed or missing so that it was not available at the trial of this case.) The specialist at the Alexandria station did not inquire of Pilot Black his destination nor his course, nor did the specialist advise him of significant weather within 150 miles of Alexandria. At this time the Alexandria Service station was in possession of the Area Weather Forecast Sigmet (significant meteorology) Charlie 2[1] and Aviation Severe Weather Forecast which called for scattered thunderstorms over northern and western Louisiana, becoming numerous with some severe thunderstorms at Longview, Texas, which is 135 nautical miles northwest of Alexandria and continuing from there to an area 60

1. Sigmet Charlie 2 issued by the Weather Bureau Forecast Center at Fort Worth at 1:10 P.M. reads:

"SIGMET Charlie 2. In Oklahoma and north Texas at 1300 in the area from Tulsa to 20 miles southwest Hobart to 50 miles southeast Abilene to Longview, Texas, to Ardmore, Oklahoma, back to Tulsa, Oklahoma, numerous thunderstorms forming occasional lines. Some of thunderstorms severe and are moving northeastward about 25 knots and continuing beyond 1700."

miles either side of a line from 40 miles southwest of San Angelo, Texas, to 60 miles north of Fort Worth, Texas. 41D's course to Fort Worth, Texas would have taken him into the area affected by this weather.

One of the regulations governing radio contact with aircraft and pertinent to furthering weather information to pilots of aircraft in communication with a particular flight service station is Part 439 of the Federal Aviation Agency Flight Assistance Service Handbook, which reads in part as follows:

> "439.2 Whenever a SIGMET or Advisory to Light Aircraft exists which involves an area within 150 miles of the station, request the pilot's route and destination. Transmit the weather advisory if it is relevant."

Witness Charlie Sides resided near the site of the crash and testified that around 5:00 o'clock in the afternoon on May 9, 1965, he was in his barn milking and heard a plane circling around over the barn; that the clouds were too low for him to see the plane; that it rained 2 inches within 20 minutes at the time he heard the aircraft; that Mr. Bill Green's barn and some trees were blown over at the time he heard the plane, and that he would estimate the winds at 35 miles an hour with gusts at 50 miles per hour. He said further that he heard a thud, at which time the noise of the plane's engine ceased. At this time, visibility, according to this witness, was about 300 yards. The next morning he was in his pasture and found the wrecked plane and three dead persons. I find that the primary cause of the crash of 41D was a thunderstorm in progress at the time and place in question.

The failure of the Service Station attendant at Alexandria to inquire of Pilot Black his route and destination and to advise him of the severe weather which he would encounter on his course to Fort Worth, Texas was negligence. Part 439 of the Federal Aviation Agency Flight Assistance Service Handbook defines correct procedures for the Service Station Specialist and this procedure was not complied with. As was said in *Ingham v. Eastern Airlines, Inc.*, 373 F.2d 227 (2nd Cir. 1967):

> "It is now well established that when the government undertakes to perform services which in the absence of specified legislation would not be required, it will, nevertheless, be liable if these activities are performed negligently."

See also *Hartz v. United States*, 387 F.2d 870 (5th Cir. 1968); *Neff, Administratrix v. United States*, 282 F. Supp. 910 (DC 1968). The negligence of the Flight Service Station Specialist was a proximate cause of the crash and the resulting damages. The very purpose of the Flight Service Station Rules and Regulations was safety. Because of the existence of such rules and regulations pilots in radio contact with a flight service station would be entitled to rely upon the fact that "significant weather" information would be conveyed to them by the service station. This appears to be particularly true when, as urged by the Government in this case, Pilot Black had not secured a weather briefing prior to his departure from Baton Rouge. The failure to warn of the severe thunderstorms which would be encountered on a flight from Alexandria to Fort Worth, Texas was "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, and without which the accident

would not have happened", and also was "one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act." Such failure was a material element and a substantial factor in producing the crash.

The parties in this case had agreed that the law of Louisiana controlled in this case. We quote from *Harvey v. Great American Indemnity Company,* 110 So.2d 595, 601 (Louisiana):

> " 'The proximate cause of an injury is the primary or moving cause, or that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act.
>
> * * *
>
> " '* * * The guiding principle is to determine whether a given act is a material element or a substantial factor in producing the particular result; . . .
>
> * * *
>
> " 'The proximate cause of an injury is not necessarily that which is next or last in time or place, but that which is a procuring, efficient and predominant cause in sense of closeness in causal relation.' * * *"

Also, in *Home Gas & Fuel Co., Inc., et al v. Mississippi Tank Co., Inc., et al,* 246 La. 625, 166 So.2d 252, 256, The Supreme Court of Louisiana said:

> "We think it sufficient to say in answer to this latter contention that when the negligence of the defendant greatly multiplies the chances of harm to plaintiff, and is of a character naturally leading to its

> occurrence, 'the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury.' * * *"

I cannot find the negligence of Pilot Allan Black, as urged by the Government, was the sole proximate cause of the crash of 41D.

It does appear that Pilot Black was also guilty of negligence on the occasion in question. He held a commercial pilot's license but, as above stated, did not have his instrument rating. He was in the process of training and study for the securing of such rating. It appears from the testimony of the experts who testified that the weather conditions described in Sigmet Charlie 2 were clearly visible. Clouds out of which thunderstorms develop are easily recognizable. It is possible of course for a pilot to fly into clouds which do not contain thunderstorms, but Pilot Black's license did not authorize him to fly into clouds. Federal Air Regulations 14 C.F.R. §61.3 provides in part:

> "(f) Instrument rating. No person may act as pilot in command of a civil aircraft under instrument flight rules or in weather conditions less than the minimums prescribed for VFR flight unless—
>
> * * *
>
> (3) In the case of an aircraft other than a helicopter or airship, he holds an instrument rating or an airline transport pilot certificate.

Section 61.83

An applicant for a private pilot certificate must pass a written test on—

> * * *

(c) Recognizing dangerous weather conditions and evaluating weather reports; . . ."

Such regulations also prescribe Visual Flight Rules as follows:

(a) Distance from clouds. Except as provided in Sec. 91.107, no person may operate an aircraft under VFR—

* * *

(2) Within any other controlled airspace at a distance less than 500 feet below or 1,000 feet above, and 2,000 feet horizontally from, any cloud formation;

* * *

(4) Outside controlled airspace at an altitude of more than 1,200 feet above the surface, at a distance less than 500 feet below or 1,000 feet above, and 2,000 feet horizontally from, any cloud formation; or

(5) Outiside controlled airspace at an altitude of 1,200 feet or less above the surface, unless the aircraft is clear of clouds.

* * *

(b) Flight visibility. Except as provided in Sec. 91.107, no person may operate an aircraft under VFR— . . .

* * *

(2) In any other controlled airspace unless flight visibility is at least three statute miles; or

INSTRUMENT FLIGHT RULES

91.115 ATC clearance and flight plan required.

No person may operate an aircraft in controlled airspace under IFR unless—

(a) He has filed an IFR flight plan; and

(b) He has received an appropriate ATC clearance."

Allan Black was not only trained but also obligated to see, observe and recognize the weather conditions into which he flew and his failure to avoid such weather conditions constitutes negligence. Under the standards above set forth, I find that such negligence was also a proximate cause of the crash of 41D.

At the time of the death of her parents, Carol Black was twenty one (21) years of age and attending university. Paula Black was nineteen (19) years of age and was also a university student. Mrs. Jo Swift, mother of Mrs. Jane Black, was a widow, seventy-eight (78) years of age. She and the two daughters resided with Dr. and Mrs. Black at 2600 Ryan Place Drive in Fort Worth, Texas. Dr. Black was fifty-two years of age and his wife was fifty years of age. Dr. Black was a pediatrician with substantial earnings. The care, counsel, advice, and the education which the parents were providing their daughters were surely of substantial value. Under the law of Louisiana, plaintiffs are entitled to recover for grief, bereavement, loss of comfort and society. It appears that plaintiffs, Mrs. Jo Swift, was living with her daughter and son-in-law and at least to some extent was dependent upon them.

I find the plaintiff, CAROL BLACK, should recover the sum of Fifty Thousand Dollars ($50,000.00) for the loss of her mother and Fifty Thousand Dollars ($50,000.00) for the loss of her father; that the plaintiff, PAULA BLACK, should recover Fifty Thousand Dollars ($50,000.00) for the loss of her mother and Fifty Thou-

sand Dollars ($50,000.00) for the loss of her father. I further find that plaintiff, MRS. JO SWIFT, should recover the sum of Fifty Thousand Dollars ($50,000.00) for the loss of her daughter, Mrs. Jane Black. It having been determined that Allan Black was negligent on the occasion in question, which negligence was a proximate cause of the accident, Government will have judgment over against the Estate of Allan Black for all sums adjudged against the Government and the Estate of Allan Black is denied recovery on its crossclaim against the Government.

This Memorandum Opinion shall constitute the Court's Findings of Fact and Conclusions of Law and counsel for Plaintiffs, Carol and Paula Black and Mrs. Jo Swift, shall supply an appropriate order within ten days.

Dated: Sept. 16, 1969.

/s/ W. M. Taylor, Jr.
United States District Judge

APPENDIX B

(Court of Appeals Opinion, 441 Fed. 2d 740)

Before GOLDBERG and DYER, Circuit Judges, and GROOMS, District Judge.

GROOMS, District Judge:

This is an appeal from a judgment, 303 F.Supp. 1249, in favor of appellees Carol Black and Paula Black in the amount of $100,000.00 each, and Mrs. Jo Swift in the amount of $50,000.00, against the United States in an action under the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346(b) 2671-2680 for the wrongful death of Dr. Thomas Black and his wife, Jane Black. The Blacks were passengers in a Cessna 182 aircraft piloted by their son Allan when the plane crashed near Mabank, Texas on May 9, 1965, at about 4:48 p.m. Carol and Paula Black are the daughters of Dr. and Mrs. Black, and Mrs. Swift is the mother of Mrs. Black.

The United States filed a third party complaint against the Estate of Allan Black and was awarded contribution from the Estate to the extent of one-half of the judgment against the United States.

The Cessna was en route from Baton Rouge, Louisiana, to Fort Worth, Texas, at the time of the crash. It left Baton Rouge at approximately 2 p.m. under Visual Flight Rules (VFR). Prior to leaving the pilot did not file a flight plan nor seek a weather briefing. At about 3 p.m., when the aircraft was in the vicinity of Alexandria, Louisiana, the pilot contacted the Flight Service Station at that place and requested the current altimeter setting and the winds at five thousand feet. He was given this

information by the attendant on duty at the Station. The attendant made no inquiry of the pilot as to his course or destination. He did not advise the pilot of significant weather conditions within 150 miles of Alexandria, Sigmet Charlie 2 (significant meteorology)[1] had been issued by the Weather Bureau Forecast Center at Fort Worth at 1:10 p.m. The Alexandria and Baton Rouge Stations were in possession of this forecast. This information was available to the pilot on inquiry at Baton Rouge when he began his flight.[2] Sigmet Charlie 3[3] superseded Charlie 2 at 3:05 p.m. Charlie 2 was broadcast every fifteen minutes until automatically cancelled by Charlie 3, which in turn was broadcast at like intervals. The Cessna was radio equipped, but it is not known whether the pilot had his radio on. Only one communication was received from the pilot during his entire flight. The first information as to the plight of the plane and its occupants came when the plane was heard circling at a low altitude in the storm in the vicinity of the crash, some 225 miles from Alexandria.

Part 439 of the Federal Aviation Flight Assistance Service Handbook provides as follows:

---

1. "Sigmet Charlie 2. In Oklahoma and North Texas at 1300 in the area from Tulsa to 20 miles southwest Hobart to 50 miles southeast Abilene to Longview, Texas, to Ardmore, Oklahoma, back to Tulsa, Oklahoma, numerous thunderstorms forming occasional lines. Some of thunderstorms severe and are moving northeastward about 25 knots and continuing beyond 1700."

2. The attendant at Alexandria came on duty after Sigmet Charlie 2 was issued and testified that the Sigmet was not relayed to him.

3. "Sigmet Charlie 3. Over Oklahoma and northeastern central and north Texas including Fort Worth area numerous thunderstorms occasionally forming lines. Extreme turbulence near most intense storms. Possibly large hail and a few tornadoes. Conditions continuing beyond 7 p.m."

> "439.2 Whenever a SIGMET or Advisory to Light Aircraft exists which involves an area within 150 miles of the station, request the pilot's route and destination. Transmit the weather advisory if it is relevant."

The court held that the failure of the station attendant at Alexandria to comply with this regulation and thereby to inquire of the pilot his route and destination and to advise him of the severe adverse weather which he would encounter on his course to Fort Worth was negligence. Appellant concedes that there was negligence on the part of the attendant in so failing in his duty.

Pilot Black held a commercial pilot's license with 600 hours flying time, but did not have an instrument rating. Federal Air Regulations 14 C.F.R. §61.83 provides that before a pilot can obtain his private pilot certificate he is required to pass a written test on "(c). recognizing dangerous weather conditions and evaluating weather reports * * *" Pilot Black had passed this test. The hazards of the weather were well known to him.

Visual Flight Rules, Sec. 91.107, prohibit a VFR pilot from flying with visibility of less than three miles and from flying within certain proscribed distances from cloud formations.

The court further found that the pilot was also guilty of negligence in that the weather conditions described in Sigmet Charlie 2 were clearly visible, that the pilot's VFR license did not authorize him to fly into clouds, Federal Air Regulations 14 C.F.R. § 61.3, and that he was obligated to observe, recognize, and to avoid the weather conditions which confronted him.

The ultimate holding was that the concurring negligence of appellant and the pilot was the proximate cause of the crash and the death of the occupants of the plane.

Appellant contends that its negligence was superseded by that of the pilot, and that the pilot's negligence was the sole proximate cause.

At the outset appellant is met by the clearly erroneous rule applicable to the court's findings as to proximate cause. Findings of fact of the lower court are not to be set aside unless clearly erroneous. Rule 52(a), Fed. R. Civ. P. In Sanders v. Leech, 158 F.2d 486, in discussing Rule 52(c) we said:

> "Under that rule, as it plainly reads and has been interpreted by the courts, it is not for the appellate court to substitute its judgment on disputed issues of fact for that of the trial court where there is substantial credible evidence to support the finding. It may reverse, though, under the rule (1) where the findings are without substantial evidence to support them; (2) where the court misapprehended the effect of the evidence; and (3) if, though there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case."

Appellant contends that substantial credible evidence does not support the finding.

[1] The rules of law applicable generally to torts govern liability growing out of the operation of aircraft. King v. United States, 5 Cir., 178 F.2d 320; United States v.

Schultetus, 5 Cir., 277 F.2d 322. The applicable law is that "of the place where the act or omission occurred." 28 U.S.C.A. §§ 1346(b) and 2672. As to the appellant the omission constituting negligence occurred in Louisiana. It follows that the Louisiana proximate cause rule governs. The Louisiana rule in pertinent part is stated in Harvey v. Great American Indemnity Co. (La. App.), 110 So.2d 595; 600:

> "The proximate cause of an injury is the primary or moving cause, or that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act.
>
> "When negligence is established, liability attaches for all injurious consequences that flow therefrom until diverted by intervention of some efficient cause that makes the injury its own, or until force set in motion by negligent act has so far spent itself as to be too small for law's notice.
>
> "* * * The guiding principle is to determine whether a given act is a material element or a substantial factor in producing the particular result * * *.
>
> "The proximate cause of an injury is not necessarily that which is next or last in time or place, but that which is a procuring, efficient and predominant cause in sense of closeness in casual relation.
>
> "[W]here a wrongful act puts other forces in operation which are natural and which the act would reasonably and probably put in action, the party who puts in force the first efficient cause will be responsible in damages for the injury proved, though

immediately resulting from the other force so put in action."

In Home Gas & Fuel Co. v. Mississippi Tank Co., 246 La. 625, 166 So.2d 252, 256, it was stated:

> "[W]hen the negligence of the defendant greatly multiplies the chances of harm to plaintiff, and is of a character naturally leading to its occurrence, 'the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury.' Reynolds v. Texas & P. Ry. Co., 37 La. Ann. 694 (1885)."

Courts generally recognize the fact that no general rule can be formulated as to when a negligent act is the proximate cause of an injury. The answer depends upon the peculiar facts of each case.

It was the pilot's responsibility to obtain a weather briefing before leaving Baton Rouge under VFR conditions. If he had done so he would have discovered in advance that there were thunderstorms ahead of him. His failure in this respect was matched by his failure to make inquiry as to the weather as he proceeded along his course. Blind reliance on lack of information, assuming that he did so rely, could scarcely absolve him from the affirmative duty of seeking information that was readily available to him on inquiry or which he could have obtained merely by monitoring the stations along his route.

The storm was intense. It covered an extensive area. It was a wholly unsafe practice for a non-instrument rated pilot to approach and penetrate any cloud formation,

least of all a storm of such severity. Such action was described as "one of the most hazardous things" a pilot could do, since in so doing he could become completely disoriented and could lose all control of his aircraft. Good, even fundamental, flying practice dictated the avoidance of the storm front that of a certainty loomed ahead of the pilot. He should have altered or reversed his course, or better still have landed at the nearest suitable airport.

It is recognized that weather is a vital factor in cross-country flights. It is first of all up to the pilot to determine whether dangerous weather conditions prevail along his intended route. He must stay on the alert in the course of his flight. He must listen and give heed to the broadcasts of weather reports that could endanger him and his passengers. He had had extensive training in weather meteorology and his plane was equipped to receive weather reports.

If pilot Black received Sigmet Charlie 2, the failure of the station attendant at Alexandria to furnish him its contents when he contacted that station could not have misled him. Two hours and forty-eight minutes elapsed from the time of take-off to the time of the crash. Almost two hours of this time followed the Alexandria contact. The plane covered approximately 320 miles from Baton Rouge and 225 miles from Alexandria. During the time the plane was in flight some twelve weather broadcasts were transmitted. These covered information as to the thunderstorms in the area toward which the pilot was heading.

The storm line was some 135 miles from Alexandria when the pilot was at that point. It was moving north-

easterly at almost thirty miles per hour. The pilot was flying in a northwesterly direction. He had penetrated the storm area to a depth of 100 miles or more. This indicates that he was attempting to fly through the storm. As the court so aptly observed in Weissman v. Prashker, 405 Pa. 226, 175 A.2d 63, the pilot's "penetration into the clouds, knowing that he could not navigate visually within them was as imprudent an act as diving into mid ocean not knowing how to swim."

When the pilot came within sight of the storm front he most certainly received visual information which stood out in more vivid detail than any that he failed to receive from the operator at the time of the Alexandria contact. He was required to have flight visibility of at least three miles. To contend that he was suddenly engulfed in such a storm flies in the face of reality. His driving himself into a readily visible storm is inexplicable except for the fact that he intended to make the unlighted field at the point of his destination before dark in order to meet the next day's engagement regarding the purchase of a helicopter; and being so motivated decided to fly through the storm taking a chance on his knowledge of instrument flying to see him through.

When the pilot saw the storm he had to make a decision either to proceed, to alter or reverse his course, or to land. His decision was to proceed. From then on can it be said that the failure of the operator almost two hours earlier to warn him of Sigmet Charlie 2 proximately contributed to that decision? We think not.

[2] The failure of the operator to warn the pilot of the presence of the storm in his path cannot be regarded as a continuing proximate cause after the pilot himself

discovered its presence appreciated the danger, and decided to fly ahead into it. To rule out an appreciation of danger disregards the pilot's weather training and 600 hours of flying experience. Any contributing effect of the operator's negligent failure was replaced by the negligent action of the pilot when he saw but did not heed the warning of the actual presence of the storm iself.

In Neff v. United States, 136 U.S. App.D.C. 273, 420 F.2d 115, the court held that neither the airport control tower's silence regarding an approaching thunderstorm, nor its clearance of flights for take-off, including flight which crashed,

> "could fairly be exalted into a governmental representation that would justify the pilots in claiming 'reliance' sufficient to warrant disregard of the apparent signs of danger."

The following language in Rowe v. United States, D.C., 272 F.Supp. 462, 471, is apposite to the situation here presented:

> "*Superseding Cause.* Even if it were found that any employee of the defendant was negligent, we think the patent recklessness of the non-instrument rated pilot superseded that negligence and would relieve the United States from liability for the deaths of Rowe and Smith. Restatement, Torts, §§ 440, 447. The intervening act of the unqualified pilot in deliberately descending into a solid overcast was not only reckless conduct, but may be regarded as so highly extraordinary as to become a superseding cause of the deaths of his passengers, Rowe and Smith. We do not think that any employees of defendant could reasonably have foreseen such conduct on the part

of the pilot. Id. § 447, comment g; and see § 500. Cf. Central Flying Service v. Crigger, 215 Ark. 400, 221 S.W.2d 45, 48."

Appellant's negligence had "so far spent itself as to be too small for [the] law's notice," and was so completely superseded by that of the pilot that it was no longer a material element contributing to the tragic results that ensued. In our judgment the findings of the lower court on the issue of proximate cause are clearly erroneous. The case is reversed with direction to enter judgment for appellant-defendant below.

APPENDIX C

(Court of Appeals Ruling on Petition for Rehearing, and for Rehearing en banc.)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Apr. 22, 1971, 5 Cir., 1971, ____ F.2d ____).

(May 27, 1971)

Before GOLDBERG and DYER, Circuit Judges, and GROOMS, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX D

FEDERAL TORT CLAIMS ACT

28 U.S.C., Section 1346 (b)

"(b) Subject to the provisions of Chapter 171 of this Title, the District Courts, together with the United States District Court for the district of the Canal Zone and the District Court of Virgin Islands, shall have exclusive jurisdiction of Civil Actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Government, while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

APPENDIX E

RULE 52 (a) FEDERAL RULES OF CIVIL PROCEDURE

"(a) Effect. In all actions tried upon the facts without a jury, or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purpose of review. Findings of fact shall not be set aside unless clearly erroneous, due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appeared therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b)."

APPENDIX F

FIFTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or an indictment of a Grand Jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived* of life, liberty or *property, without due process of law;* nor shall private property be taken for public use, without just compensation." (Emphasis ours)

APPENDIX G

FEDERAL AVIATION AGENCY FLIGHT ASSISTANCE SERVICE HANDBOOK, SECTION OR PART 439, SECTION 439.2

"439.2. Whenever a SIGMET or Advisor to Light Aircraft exists which involves an area within 150 miles of the station, request the pilot's route and destination. Transmit the weather advisory if it is relevant."

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No. 71-281

In the Supreme Court of the United States

OCTOBER TERM, 1971

CAROL BLACK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION.

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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CAROL BLACK, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. This action was brought by petitioners against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), for the wrongful deaths of Dr. Thomas Black and his wife, Jane Black, who died in a plane crash. The United States filed a third party complaint against the estate of the pilot.

Allen Black, the pilot, was flying a Cessna 182 from Baton Rouge, Louisiana to Fort Worth, Texas accompanied by his parents, Dr. and Mrs. Black. Although he had not been warned by the Federal Aviation Administration ("F.A.A.") operator in Louisiana that a line of thunderstorms had formed in Texas and Oklahoma, the storm clouds became clearly visible

during the flight. The pilot flew into the clouds in spite of the fact that he was required to fly VFR (Visual Flight Rules) and was thus forbidden to enter clouds or any other weather obscuring vision (14 C.F.R. 91.105). Approximately 100 miles after entering the clouds, the plane crashed (Pet. App. A. 23–25).

The district court found that both the failure of the F.A.A. operator to warn the pilot of the thunderstorms and the negligence of the pilot in flying into the path of a storm which was plainly visible were the proximate causes of the crash. Accordingly, petitioners were awarded judgments against the United States aggregating $250,000 (Pet. App. A. 30–31); the United States in turn was granted judgment on its third party complaint against the pilot's estate (*id.* at 31).

On appeal, the court of appeals noted that the F.A.A. operator's failure to give the pilot adequate weather information occurred two hours before the plane reached the storm and that "the pilot's 'penetration into the clouds, knowing that he could not navigate visually within them, was as imprudent an act as diving into mid ocean not knowing how to swim' " (Pet. App. B. 39). Accordingly, the court held that "[t]he failure of the operator to warn the pilot of the presence of the storm in his path cannot be regarded as a continuing proximate cause after the pilot himself discovered its presence, appreciated the danger, and decided to fly ahead into it. To rule out an appreciation of danger disregards the pilot's weather training and 600 hours of flying experience" (Pet. App.

B39–40). Overturning as clearly erroneous the district court's finding that the government's negligence was a proximate cause of the accident, the court below reversed the judgment of the district court.

2. The decision below exonerating the government from liability was based on a careful analysis of the facts and presents no issue warranting review by this Court. Contrary to petitioners' assertions, the court of appeals properly applied the clearly erroneous standards embodied in F.R. Civ. P. 52(a) and recognized the applicability of Lousiana law (Pet. App. B. 35–37).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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